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CC Docket No. 80-286
DA 98-909

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of The National)	
Exchange Carrier Association, Inc.)	
)	
Petition for Interim Waiver of)	CC Docket No. 80-286
Section 36.2(a)(3) of the)	DA 98-909
Commission's Rules)	
)	

REPLY COMMENTS OF INTERMEDIA COMMUNICATIONS CORPORATION

Intermedia Communications Corporation, by its attorneys, respectfully submits these Reply Comments for consideration by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding concerning the petition by the National Exchange Carrier Association ("NECA") for an interim waiver^{1/} of Section 36.2(a)(3) of the Commission's rules.^{2/}

INTRODUCTION AND SUMMARY

Intermedia Communications Corporation ("Intermedia") is today the largest independent competitive local exchange carrier ("LEC") in the United States as well as the parent company of one of the country's leading nationwide business Internet Service Providers ("ISPs"), DIGEX. Through its expansive facilities, Intermedia provides widespread data, Internet, long distance,

^{1/} In the Matter of the National Exchange Carrier Association, Inc., Petition for Waiver of Section 36.2(a)(3) of the Commission's Rules, Petition for Interim Waiver, CC Docket No. 80-286, filed May 8, 1998 ("NECA Petition").

^{2/} This section requires carriers to develop "actual use" measurements for determination of the FCC's jurisdictional separations procedures pursuant to studies of traffic handled or work performed during a representative period for all traffic. 47 C.F.R. § 36.2(a)(3).

and local voice services to residential and business consumers throughout the United States and Canada and to regions of South and Central America. As a vibrant telecommunications competitor in both the traditional voice and emerging data markets, Intermedia shares the concern expressed by NECA and all parties that commented upon NECA's Petition that cost allocations and jurisdictional assignments must be accurate and fair. To attain this goal, however, the FCC should deny the relief that NECA requests.

In its Petition, NECA asserts that the continuing dramatic growth in Internet traffic is distorting separations studies and making it impossible to determine truly "representative" traffic data as required under Section 36.2(a)(3) of the Commission's rules.^{3/} Relying upon its assertion that "Internet traffic is interstate,"^{4/} NECA argues that the FCC should grant an "interim waiver" on behalf of all companies participating in the NECA traffic sensitive pool to permit the use of data from either a specified study period or an average of several study periods to determine the relative intrastate/interstate use of facilities for separations purposes.^{5/} In support of its Petition, NECA states that there are outstanding issues regarding the separations treatment and jurisdictional classification of Internet and ISP traffic that warrant the grant of its Petition.^{6/}

While there is no question that there has been almost unprecedented growth in the use of the Internet in the recent years, the fact is, however, that NECA and its supporting commenters have failed to provide any real evidence of separations "distortions" that would justify the grant of the NECA Petition. Indeed, the pleadings of NECA and its supporters in effect assume the result they seek -- that ISP traffic is today improperly treated as intrastate. Thus, arguing from

^{3/} NECA Petition at 2. See also Comments of ICORE, Inc. at 1-2; Comments of Home Telephone Company at 5; Comments of Matanuska Telephone Association at 2.

^{4/} NECA Petition at 4.

^{5/} NECA Petition at 3, 6.

^{6/} Id. at 2.

the premise that ISP traffic should no longer be treated as local traffic but rather should be reclassified as interstate, these parties point to potential implications of this “misallocation” as grounds for the requested relief. Under these circumstances, the FCC cannot conclude that NECA has met its burden to demonstrate “good cause” for the grant of the interim waiver.

Certainly, Intermedia recognizes that the Commission has been often asked to address the jurisdictional nature of ISP traffic and presently has several open proceedings in which incumbent carriers contend that the FCC should reverse its long standing position that ISP traffic is properly treated as intrastate traffic, analogous to other local traffic. For instance, at a minimum, the Commission is examining this issue in the context of its Access Charge reform docket,^{7/} its proceeding regarding reciprocal compensation for ISP traffic,^{8/} its Notice of Inquiry concerning Internet traffic,^{9/} and the ongoing separations reform proceeding.^{10/} While Intermedia contends that sound legal, economic and policy grounds exist for the FCC to reaffirm its present treatment of ISP traffic in the context of those proceedings, even if the Commission were to reverse its course, it absolutely should not do so in the context of this interim waiver petition. Significantly, even parties that agree with the premise that ISP traffic should be reclassified as

^{7/} In the Matter of Access Charge Reform, First Report and Order, FCC No. 97-158, CC Dockets Nos. 96-262, 94-1, 91-213, 95-72 (released May 16, 1997) at ¶ 345, appeal pending sub nom. Southwestern Bell Telephone Co. v. FCC, No. 97-2661 et seq. (8th Cir.) (“Access Charges Order”).

^{8/} Request by Association for Local Telecommunications Services for Clarification of the Commission’s Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30 (filed June 20, 1997) (“ALTS Reciprocal Compensation Request for Clarification”).

^{9/} In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Inquiry, 11 FCC Rcd 21354, 21490-93 (1996) (“Internet NOI”).

^{10/} In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, FCC No. 97-354, CC Docket No. 80-286 (released October 7, 1997) (“Separations Reform NPRM”).

interstate concede that it is inappropriate for the FCC to decide the issue in the context of the instant waiver petition.^{11/}

Finally, in denying NECA's Petition, the FCC should clearly articulate that any entity that purports to have and rely upon an Internet traffic measurement mechanism must make all details of such a mechanism public so that the Commission and interested parties can analyze and understand it. Despite the representations by some parties that the jurisdictional nature of Internet and ISP traffic can now be tracked and measured,^{12/} to Intermedia's knowledge, such usage is still virtually impossible to track accurately and economically. Thus, since these usage measurement procedures are increasingly cited as enabling the FCC to address conclusively the jurisdictional nature of ISP traffic, and have even formed the basis for some carriers to alter unilaterally their jurisdictional classification of ISP traffic,^{13/} it is essential that all details of these procedures are made public so that they may be examined fully in the context of the appropriate proceedings regarding the proper classification of ISP traffic.

ARGUMENT

I. NECA's CONCERNS DO NOT JUSTIFY GRANT OF THE REQUESTED WAIVER

In support of its request for an interim waiver, NECA and its supporters assert that the growth of Internet traffic is creating distortions in jurisdictional allocations that are increasingly

^{11/} See, e.g., Comments of SBC at 3; Comments of USTA at 1-3; Comments of Fred Williamson & Associates at 4.

^{12/} See, e.g., Comments of SBC at 4; Comments of Northeast Florida Telephone Company at 2; NECA Petition at 4.

^{13/} NECA Petition at 2; SBC written ex parte presentation in CC Dockets Nos. 80-286, 96-45, 96-262, 97-30 (May 8, 1998), Attachment Tab 1 at 3, 4, 7 ("SBC May 8 ex parte"); SBC letter to Magalie R. Salas, Secretary, Re: oral ex parte communication on May 13, 1998 in CC Dockets Nos. 80-286, 96-45, 96-262, 97-30 (May 15, 1998) ("SBC May 15 letter"); SBC Letter to Ken Moran, Chief, Accounting and Audits Division, Federal Communications Commission (January 20, 1998).

significant.^{14/} As such, these parties argue, the Commission should grant an “interim” waiver to NECA (and potentially all incumbent LECs) until the FCC addresses again the jurisdictional treatment of ISP traffic.^{15/} In effect, what NECA and its supporters seek is an immediate change in the long standing treatment of ISP traffic by both the FCC and numerous state jurisdictions until the FCC completes pending proceedings in which the issue has been raised once again.

At the outset, the FCC should reject NECA’s request as failing to comport with well settled principles regarding what constitutes the requisite “good cause”^{16/} for the grant of a waiver. As applied, such “good cause” exists where “particular facts would make strict compliance inconsistent with the public interest.”^{17/} Thus, although the waiver process remains available to permit the FCC to take account of situations where genuine hardship would result, the courts have made clear that “[a]n applicant for a waiver faces a high hurdle even at the starting gate.”^{18/} In the instant circumstances, NECA has failed to clear this hurdle.

First, rather than a “waiver” of a particular rule, what NECA and its supporters really appear to want is a fundamental change in the manner in which ISP traffic is treated. Indeed, the asserted “problem” that the requested waiver would “solve” is nonexistent if the FCC fails to change its long held position that ISP traffic should be treated as other local traffic.^{19/} As the FCC well knows, and even NECA and its supporters concede, the question of the proper

^{14/} See, e.g., NECA Petition at 2; Comments of ICORE, Inc. at 1-2; Comments of Home Telephone Company at 5; Comments of Washington Independent Telephone Association at 2.

^{15/} See, e.g., NECA Petition at 1; Comments of Frederick & Warinner at 3; Comments of Washington Independent Telephone Association at 3. Notably, NECA itself states that it would not object to the grant of the waiver to other telephone companies. See NECA Petition at 1, n.1.

^{16/} 47 C.F.R. § 1.3.

^{17/} See, e.g., Omnipoint Corporation v. FCC, 78 F.3d 620, 631 (D.C. Cir. 1996); Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (subsequent history omitted).

^{18/} See In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Memorandum Opinion and Order, DA 98-3, January 2, 1998 at ¶ 6, citing WAIT Radio, *supra*.

jurisdictional treatment of ISP traffic is being considered in numerous other proceedings, including the Access Charge Reform proceeding, the docket concerning reciprocal compensation for ISP traffic, the separations reform proceeding, and the Notice of Inquiry concerning the Internet.^{20/} In light of these proceedings in which the issue is being addressed carefully and thoroughly, it would be wholly improper for the FCC effectively to decide the issue in the context of the instant waiver Petition.^{21/}

Second, despite NECA's statements that there is a certain urgency that requires immediate FCC action,^{22/} any "urgency" that now may exist has been created solely by NECA itself. NECA could have filed its request at any time, rather than six or so weeks prior to the "typical" time it alleges cost studies are performed. Moreover, there is nothing in the Petition that refers to any new evidence or measurement techniques that required NECA to make its request at this time. Rather, it appears that the Petition is really an attempt to press the FCC into making a fundamental legal and policy change on an expedited basis in the context of a waiver request.

Significantly, even parties that agree with NECA's assertion that ISP traffic should be classified as "interstate," concede that the waiver process is not the proper forum for addressing

^{19/} See, e.g., Access Charges Order at ¶¶ 344-48.

^{20/} See e.g., Access Charges Order at ¶¶ 344-48 (concluding that the current intrastate treatment of ISPs for access charges purposes will remain in place); ALTS Reciprocal Compensation Request for Clarification at 1 (seeking a determination that the FCC's local competition order did not change the intrastate treatment of ISP traffic for reciprocal compensation purposes); Separations Reform NPRM at ¶ 49 (requesting comments on whether a proposed freeze of the separations allocations factors would adequately reflect the changing use of the telecommunications network due to increased Internet use); Internet NOI at 21490-93 (inviting commenters to present evidence on the "jurisdictional, metering, and billing questions, given the difficulty of applying jurisdictional divisions or time-sensitive rates to packet-switched networks such as the Internet.").

^{21/} See, e.g., Application of Oregon Radio Inc. and Storer Broadcasting Company, FCC 56-1133, 14 RR 742 (1956) (If a party believes a rule is either ineffective or inappropriate, "a request for an individual waiver is not the proper remedy. Rather, a petition for rule making to change the basis of the rule would be required.").

^{22/} NECA Petition at 6. There, NECA states that "immediate action" is needed because the required studies are typically completed in the July-September time frame.

the important issues surrounding ISP traffic. For instance, SBC, perhaps the most vocal proponent of the position that ISP traffic should be deemed interstate, notes that while NECA's approach has some appeal, it is only of a "stop-gap nature."^{23/} Similarly, USTA urges the FCC to address the issue in a "comprehensive, permanent" manner and requests action on its pending jurisdictional "freeze" proposal.^{24/} While Intermedia disagrees strongly with these parties that the current jurisdictional treatment of ISP traffic should be changed, it agrees that the Commission's waiver process is not the proper vehicle even to consider this important issue. As such, the FCC should deny the requested waiver.

II. THE RECORD FAILS TO DEMONSTRATE THAT THE FCC SHOULD ALTER ITS CONSISTENT LONG STANDING TREATMENT OF ISP TRAFFIC

Significantly, the NECA Petition and the comments of those parties that support NECA's contention that ISP traffic should be reclassified as "interstate," fail to demonstrate that the Commission should alter its conclusion that ISP traffic is properly treated in a manner analogous to other local traffic, including for separations purposes. Intermedia urges the FCC to reaffirm this well-reasoned holding.

Since the FCC first addressed the question of the proper treatment of enhanced (or information) service provider traffic, of which ISP traffic is a subset, it has consistently held that such traffic is properly treated as intrastate traffic for regulatory and jurisdictional purposes.^{25/}

^{23/} Comments of SBC at 3.

^{24/} Comments of USTA at 1-3. See also Comments of Fred Williamson & Associates at 4 (waiver is unnecessary since the FCC has not made a specific ruling on the classification of Internet traffic for separations purposes).

^{25/} In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 417-23 (1980); In the Matter of MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682, 715 (1983) ("Access Charge Reconsideration Order") (ISPs would not be required to pay interstate access charges and could buy services from ILECs under intrastate and user tariffs); In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd 2631 (1988) (determining not to apply interstate access charges).

Indeed, only last year, after considering a voluminous record on this very issue in its Access Charge Reform proceeding, the FCC reaffirmed again that ISPs should not be treated in a manner analogous to interstate interexchange carriers.^{26/} Significantly, in reaching this conclusion, the FCC rejected the very arguments that NECA and its supporters now advance in support of the NECA Petition.

For example, some commenters argue that the current treatment of ISP traffic is causing incumbent LECs, particularly NECA pool members, to incur costs for which they are not being compensated.^{27/} Yet, after reviewing thousands of pages in which incumbent carriers made virtually identical arguments, the FCC was not convinced that such uncompensated costs exist.^{28/} In fact, the Commission has been clear and emphatic that the current treatment of ISP traffic advances important legal and public policy goals and should be continued.^{29/}

Notably, the so-called “data” that is proffered by many commenters is unsubstantiated and often assumes the result that they seek – a finding that ISP traffic is presently classified incorrectly for jurisdictional purposes. For example, Home Telephone Company claims that ISP traffic is about 12.5% of its total traffic, with the average Internet user on the Internet 88 minutes per day, which results in a substantial loss of revenue.^{30/} Home offers no information on how it arrived at these figures, however. Likewise, the Washington Independent Telephone Association asserts that up to 70% of its traffic is “modem usage,” but provides no real evidence to explain

^{26/} See Access Charge Order at ¶¶ 344-348.

^{27/} See, e.g., Comments of Northeast Florida Telephone Company at 3; Comments of the Washington Independent Telephone Association at 2; Comments of Home Telephone Company at 5-6.

^{28/} Access Charge Order at ¶ 346.

^{29/} Id. at ¶ 344.

^{30/} Comments of Home Telephone Company at 5.

this assertion.^{31/} Similarly, Matanuska Telephone claims that it experienced an 8% increase in its local Dial Equipment Minutes (“DEM”) attributable to Internet usage, but also fails to explain the methodology it used or set forth the data produced by the study.^{32/} While these parties may genuinely believe that ISP traffic is substantial and should be treated differently by the FCC and relevant state commissions, the FCC cannot use bald claims as a basis to change its present well-reasoned rules.^{33/}

In reaffirming its conclusion that ISP traffic is properly classified as intrastate, including for separations purposes, the FCC should also be mindful of the findings of numerous state regulatory commissions that have examined the jurisdictional nature of ISP traffic and have unanimously concluded that it should remain classified as intrastate.^{34/} As noted by ALTS, at least nineteen states have ruled that ISP traffic should be treated as intrastate.^{35/} Given the extensive consideration of this issue in the context of those proceedings, the FCC should not now allow the waiver process and the unsubstantiated claims of incumbent LECs to overturn long established precedent.

^{31/} Comments of the Washington Independent Telephone Association at 2.

^{32/} Comments of Matanuska Telephone Association at 2.

^{33/} As noted above, the FCC has several open proceedings in which it is considering generally the issue of ISP traffic and the impact of ISP traffic on its rules. To the extent any party has what it deems relevant data, it should file it in the relevant proceeding so that it may receive the full and careful scrutiny it deserves.

^{34/} These states are: Arizona, Colorado, Connecticut, Illinois, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin. Comments of ALTS at 15-18. See also, NARUC Resolution No. 7, Asserting State Authority Regarding ISP Reciprocal Compensation (adopted November 11, 1997) (ISP traffic should continue to be treated as subject to state jurisdiction) cited by Comments of ALTS at 8. The issue is also pending in several other states.

^{35/} Comments of ALTS at 15-18.

III. THE FCC SHOULD REQUIRE CARRIERS TO MAKE PUBLIC ALL DETAILS OF INTERNET TRAFFIC MEASUREMENT MECHANISMS

Finally, as noted above, the NECA Petition and several commenters refer to procedures or mechanisms that they claim enable them to assess the jurisdictional nature of Internet traffic.^{36/} For example, in its comments, SBC refers to a recent ex parte presentation in which it asserts that it has “developed measurement procedures to identify Internet usage,” and that “an analysis” shows that 92 to 99 percent of ISP traffic is interstate.^{37/} SBC also refers to a usage measurement procedure that would identify ISP traffic based upon matching all ISP usage with assigned telephone numbers.^{38/} If the FCC genuinely believes that these so-called techniques are viable and/or relevant, it must require that all details of these ISP traffic measurement mechanisms be made public.

On the whole, the underlying assumption of such “mechanisms” appears to be that all ISP traffic should be deemed interstate, and thus, all that is required is a process to identify ISP traffic volumes. It is for this reason that SBC is requesting that competitive LECs provide it with telephone numbers assigned to ISPs.^{39/} The FCC should recognize the circular nature of these so-called procedures. Even if all ISP traffic were identified as such, it reveals absolutely nothing about its jurisdictional nature. Moreover, despite claims regarding the feasibility of a database-dependent mechanism that would track telephone numbers, it is Intermedia’s understanding that not only are there significant issues regarding the accuracy of such an approach, but the costs of such a mechanism would be prohibitive.

^{36/} See, e.g., NECA Petition at 2.

^{37/} SBC May 8 Ex Parte Attachment Tab 1 at 4, 7; SBC May 15, 1998 letter at 2.

^{38/} Comments of SBC at 6.

^{39/} Id. at 5-6.

Further, to the extent parties claim there exist traffic measurement mechanisms that can track more specifically the jurisdictional characteristics of ISP traffic, such as the SBC “analysis” that purports to identify a certain percentage of ISP traffic as interstate or international,^{40/} the FCC should require the particulars of these mechanisms to be made public. To Intermedia’s knowledge, it is virtually impossible for any ISP to track the usage of its customers, even assuming it were relevant what an individual ISP customer may do during the course of an online session. In a single session, a user may well interact only with an ISP’s server, may send E mail across the street or around the world, or may access websites on the World Wide Web, some of which may be within the state and some of which may not be. Because these decisions are customer directed, the ISP is aware only of the customer’s usage, not the particulars of a customer’s online session.^{41/} In fact, it is this very impossibility of identifying the intrastate and interstate portion of an online user’s call that has permitted the FCC to adopt its current treatment of this traffic.^{42/}

Despite Intermedia’s belief that it has been and remains impossible for any carrier or ISP to track the jurisdictional nature of ISP traffic, if techniques have been developed to measure such traffic with precision, they should be made public so the FCC and interested parties can understand and analyze them. Only by subjecting these so-called measurement procedures to

^{40/} See, e.g., SBC May 8 Ex Parte Attachment Tab 1 at 7.

^{41/} Moreover, any attempt to determine the jurisdictional nature of data traffic from web servers to ISP users could well create a crazy-quilt of separations factors, giving preferred treatment to users in states, such as California, New York, Virginia, or Washington, that are home to large amounts of Internet activity or servers that house a larger number of popular websites.

^{42/} See, e.g., Northwestern Bell Telephone Company, 2 FCC Rcd 5986, 5988 (1987) (FCC treats ISPs similar to other mixed use networks). See also Illinois Bell Telephone v. FCC, 883 F. 2d 104, 114 (D.C. Cir. 1989) (Centrex costs can be recovered through state tariffs even though there is a mixed interstate-intrastate character of the service).

thorough scrutiny in the relevant dockets, as referenced above, can the FCC and the public be assured that they form a full and fair basis for future FCC decisions.

CONCLUSION

For the foregoing reasons, Intermedia contends that NECA has not demonstrated the required "good cause" for the grant of its waiver Petition. As such, Intermedia respectfully requests that the Petition be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Donna N. Lampert', is written over a horizontal line.

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Dated: June 18, 1998

CERTIFICATE OF SERVICE

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